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Supreme Court of the United States

OCTOBER TERM, 1931

No. 608

ERIE RAILROAD COMPANY, Petitioner,

vs.

MICHAEL DUPLAK, by Next Friend, STEVE DUPLAK, and STEVE DUPLAK and ANNIE DUPLAK, as Individuals, Respondents.

Brief in Opposition to Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

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FEDER & RINZLER,
Counsel for Respondents.

36,422

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BRIEF IN OPPOSITION TO PETITION.

Addition to Petitioner's Summary of Statement of the Matter Involved.

An inspection of several of the exhibits in the instant case makes for clarity the questions involved. Respondents' map-exhibit P-3 (R. p. 148) shows the bridge in question upon which the infant respondent was injured, as crossing the Dundee Canal carrying the Railroad Company's track from First Street to Passaic Street in Passaic. Exhibits P-1, P-2, D-1, D-2 and D-5 (R. pp. 148-149) show the planked foot-way over said bridge which

had been in common use by the public for over some twenty years (R. p. 15).

Exhibit P-4 (R. p. 148) shows the structural character of the spring boards attached to the bridge without let or hindrance from the petitioner, from which children dove when swimming into the canal (R. p. 54). For over a period of twenty years, the boys used to play upon the bridge, run on the railroad tracks and ties, play with the water by leaning over from the bridge, and stand upon the spring board; and, in the winter when the water froze, they went skating from the bridge (R. p. 18, ll. 32-40; R. p. 19, ll. 1-20; R. p. 25, ll. 20-30; R. p. 28, ll. 10-40; R. p. 34, ll. 1-15; R. p. 53, ll. 1-10; R. p. 54, ll. 1-28; R. p. 55, ll. 1-40; R. p. 56, ll. 1-40; and R. p. 57, ll. 1-20).

Petitioner admitted that children habitually played on the bridge (R. pp. 27-28) from time to time during a period of twenty years (R. p. 28) and under the uncontradicted evidence (R. p. 28) submitted the question to the Court as one of fact to decide—whether the situation presented constituted a case within the attractive nuisance doctrine (R. pp. 136 and 143), whereupon the Court decided "that this bridge in this case is an attractive *structural* nuisance" (R. p. 144).

Petitioner concedes that it had established the custom of giving certain signals or warnings before moving trains on the bridge; that a member of the crew used to come on the bridge and clear it before a train would move upon it. Petitioner admits that on the occasion of this accident, however, these customary signals or warnings were not

given—no member of the crew came upon the track to clear it or gave *any* warning.

The boy was not concealed under one of the freight cars. His presence on the track *was observed* by witnesses, one of which hollered, "Stop, stop", when the train was 60 to 65 feet away (R. p. 37, ll. 20-40; R. p. 38, ll. 1-40). The engineer says that he did not hear this, but he admits that he is hard of hearing (R. p. 93, ll. 18-40).

The witness, Chowanetz, indicated to the trial court and jury the position of the boy on the track at the time of the accident—reaching into the water with his hands; yet the crew did *not* see him, this, no doubt, because they neglected to look.

ARGUMENT.

I.

The Petitioner having left to the Court to say as a fact whether the bridge in question was an attractive nuisance, its finding upon that fact is conclusive.

The parties to the action on the trial of the cause in open court having consented to the trial court finding as a fact or not whether the bridge upon which the infant respondent was injured was an attractive nuisance, and there being uncontradicted evidence from which the court could have found such fact, this court will respect said court's finding, and the judgment should not be disturbed.

II.

Section 55 of the New Jersey Statute concerning railroads is inapplicable.

Section 55 of the New Jersey statute concerning railroads is set out in full at page 9 of the petitioner's brief, it seemingly adopting the policy of the common law as understood in the State Court, but not as determined by the Circuit Court of Appeals for the Third Circuit which affirmed the judgment in the instant case upon prior decided cases. While the statute in question under the State decisions, as distinguished from the Circuit Court of Appeals decisions, gives to the petitioner a right of exemption, there is nothing in the statute itself that prohibits or deters the petitioner from waiving that right, causing a change in its position and leaving it open to predicable liability on established proof.

The facts in the instant case were sufficient to establish an effective waiver of the statutory right so given to the petitioner, it being only necessary, we conceive, to point to the determination of fact by the Trial Court that the bridge was an attractive nuisance, to show that the petitioner's conduct had conclusively led the infant respondent to act upon the facts tending to make up the waiver, to his detriment.

Having knowingly exposed the bridge in question to children of an age when they follow a bait as mechanically as a fish—a place that was certain

to attract them, has the same legal effect as an invitation to them even though not to an adult, because there was no difficulty in the way of the court in implying a license—as it uncontradictedly appears that children were in the habit of playing on the bridge at and about the place where the infant respondent was injured for a period of over twenty years.

III.

There was evidence enough to require the submission of the case to the jury as to the negligence of the defendant.

The bridge was not only used as a public bridge in the same way as a public highway public bridge in the same way as a public highway is used but was also used by little children as a playground for over twenty years, without let or hindrance by the petitioner or its servants who knew this and permitted the bridge to be so used.

Petitioner had established the custom of clearing the bridge before moving a train over it (R. p. 54, ll. 20-40), yet on the occasion of this accident, the customary warnings were not given, and the petitioner's servants did not clear the bridge or look to see if any children or any one else was on the bridge in a position of danger, and backed the train without *any* warning.

Young Duplak's position on the rail, however, was such that he could easily be observed by any one who looked to *see*. The witness, Chowanetz,

actually saw the boy, and indicated to the jury his position at the time of the accident. He showed how the boy leaned over the side of the bridge, reaching into the water with his hands (R. p. 43, ll. 1-35).

The train was backed on to the bridge, but when it was still 60 or 65 feet away from the little child, someone hollered, "Stop, stop" (R. 37, ll. 20-40; R. p. 38, ll. 1-20). The engineer says he did not hear anyone holler, but this is explained by his admission that he is somewhat hard of hearing (R. 93, ll. 18-40).

Not having given the customary signals or warnings before backing or moving the train on to the bridge—a structural attractive nuisance upon which this child had the lawful right to be, and where petitioner should have anticipated children might be, not having cleared the track as petitioner usually did, and not having given *any* signal or warnings or observed the child upon the track, although he was in a position where he could be seen by anyone who looked to see, and was actually seen, a question of fact for determination by the jury was presented.

Conclusion.

The facts in the instant case being clearly distinguishable from the opinion of this Court in *U. S. Zinc Co.* vs. *Britt*, 258 U. S. 268—Section 55 of the New Jersey Railroad Act being inapplicable, and sufficient evidence of the Petitioner's negligence having been shown warranting the submis-

sion of the case to the jury, and there being no special or important reasons or errors of law to be reviewed, sound judicial discretion requires that the judgment of the Circuit Court of Appeals for the Third Circuit should remain undisturbed and Petitioner's writ of certiorari should be denied.

MICHAEL DUPLAK, by his next friend, STEVE DUPLAK, and STEVE DUPLAK and ANNIE DUPLAK, as Individuals,

By FREDERICK B. SCOTT, and
FEDER & RINZLER,
Counsel.